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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

RAMON AGUILERA,

Plaintiff and Appellant,

v.

20TH CENTURY INSURANCE
COMPANY,

Defendant and Appellant.

B190775

(Los Angeles County
Super. Ct. Nos. BC174047)

APPEALS from a judgment of the Los Angeles Superior Court, John Shepard Wiley, Jr., Judge. Affirmed.

Law Offices of Ian Herzog, Ian Herzog, Evan D. Marshall; Law Offices of Joseph Daniel Davis and Joseph D. Davis for Plaintiff and Appellant.

Barger & Wolen, Kent R. Keller, Larry M. Golub, Vivian I. Orlando; Demler, Armstrong & Rowland, Terry A. Rowland, Robert W. Armstrong and James P. Lemieux for Defendant and Appellant.

INTRODUCTION

Plaintiff Ramon Aguilera (Aguilera)¹ appeals from a judgment in favor of defendant 20th Century Insurance Company (20th Century).² 20th Century has filed a protective cross-appeal from the same judgment.

This is the third opinion on appeal in this case. In the first appeal, another plaintiff, Cecilia Encarnacion, individually and as guardian ad litem for her children Nubia Cecilia Gonzalez, Marcos A. Gonzalez, Jr. and Hilda Cecilia Gonzalez (collectively Encarnacion), appealed from a summary judgment in favor of 20th Century. In *Encarnacion v. 20th Century Insurance Company* (May 8, 2000, B127594) [nonpub. opn.] (*Encarnacion I*), we reversed the summary judgment and remanded the case for trial.

In the second appeal, *Encarnacion v. 20th Century Insurance Company* (September 27, 2007, B179825 c/w B182737) [nonpub. opn.] (*Encarnacion II*), 20th Century appealed from a judgment in favor of Encarnacion. Encarnacion appealed from the same judgment as well as from a judgment of dismissal in a second case entered after the court sustained 20th Century's demurrer without leave to amend. We affirmed both judgments. We also remanded the matter for further proceedings on Encarnacion's claim for *Brandt*³ fees.

¹ Aguilera died during the pendency of this appeal, and the appeal is being pursued by his son and daughter, Jesus and Angela Aguilera, as his successors in interest. For ease of reference, we still refer to Aguilera as the plaintiff and appellant.

² Although 20th Century is now 21st Century Insurance Company, we use the prior designation, as it has been used throughout the litigation.

³ These are attorney's fees recoverable as damages in a personal injury action. (*Brandt v. Superior Court* (1985) 37 Cal.3d 813, 815, 817.)

FACTUAL AND PROCEDURAL BACKGROUND⁴

Aguilera rented property in Los Angeles to Marcos Gonzalez (Gonzalez) and Encarnacion, who lived there with their three children. There was a dispute over unpaid rent which culminated on March 1, 1994 with Aguilera shooting Gonzalez to death.

Aguilera had a homeowners policy issued by 20th Century. Section I of the policy addresses coverages. In the Section I exclusions, the policy provides: “We do not cover loss resulting directly or indirectly from any of the following, whether or not any other cause or happening contributes concurrently or in any sequence to the loss:

“1. Intentional or criminal acts of any insured, if the loss that occurs:

“a. is a foreseeable result of such act; or

“b. is in fact the intended result of such act.”

Section II of the policy contains personal liability and medical payment coverages. In the Section II exclusions, the policy provides that these coverages “do not apply to:

“a. bodily injury or property damage which is a foreseeable result of an intentional or criminal act of any insured or which is in fact intended by any insured;

“b. bodily injury or property damage arising out of business pursuits of any Insured or the rental or holding for rental of any part of any premises by any insured.”

Aguilera was charged with murder. Based upon representations by 20th Century’s representatives which suggested that Aguilera’s actions would be covered if he was not guilty of an intentional act, Aguilera was permitted to plead guilty to involuntary manslaughter. This was so that Encarnacion would be entitled to the proceeds of Aguilera’s policy as compensation for Gonzalez’s death.

⁴ The basic facts are set forth in detail in *Encarnacion II*. Inasmuch as the instant appeal primarily involves procedural issues, we do not set forth the facts in detail again but provide a brief overview of the facts previously set forth and discuss the procedural background of the case in more detail.

20th Century then denied coverage under the criminal acts exclusion of the policy. In light of the denial of coverage, Encarnacion proceeded with a wrongful death action against Aguilera. 20th Century defended Aguilera under a reservation of rights. Encarnacion obtained a judgment in the amount of \$5.6 million on September 6, 1996. Thereafter, Aguilera assigned his rights against 20th Century to Encarnacion.

On July 3, 1997, Encarnacion and Aguilera filed the instant action against 20th Century and its counsel. Both sued 20th Century for breach of the implied covenant of good faith and fair dealing. In addition, Encarnacion sued 20th Century for breach of contract, and Aguilera brought a cause of action for legal malpractice. 20th Century filed a cross-complaint for declaratory relief.

20th Century obtained a summary judgment. In *Encarnacion I*, we reversed based on the doctrine of estoppel. Following various proceedings, we ordered that the issue of estoppel be tried by the court as an equitable matter. (*Encarnacion v. Superior Court* (Jun. 19, 2002, B157545) [nonpub. opn.].)

The case proceeded to a court trial before Judge Stephen Czuleger. On September 26, 2003, Judge Czuleger found in favor of Encarnacion and Aguilera on their equitable theories. After further proceedings, on October 5, 2004, Judge Czuleger entered judgment in favor of Encarnacion and against 20th Century in the amount of the judgment in the wrongful death action plus interest and costs, \$10,519,602.58. Both 20th Century and Encarnacion appealed from this judgment and we affirmed.

Meanwhile, on April 6, 2004, Aguilera moved to determine what statement should be read to the jury in Phase II of the trial, which he characterized as a jury trial on the issue of his damages. Aguilera sought to have a lengthy statement, based on the statement of decision in Phase I, the court trial of the equitable issues, read to the jury. Aguilera's purpose in doing so was to avoid relitigation of the issues he claimed were decided in Phase I. 20th Century opposed this motion on the grounds Aguilera's proposed statement was without legal precedent and would eviscerate its right to a jury trial on the issue of bad faith. It submitted its own proposed statement to be read to the jury. Its statement basically limited the issues decided in Phase I to 20th Century's being

barred from raising policy exclusions as a defense and its liability for the judgment in favor of Encarnacion.

20th Century also moved to clarify the issues remaining to be tried. Judge Czuleger denied this motion. The case was then transferred to Judge John Shepard Wiley, Jr. for trial. 20th Century and Aguilera briefed the issues to be tried.

Following a hearing, Judge Wiley issued an order regarding the scope of trial and the statement to be read to the jury. As to the issues remaining to be tried, Judge Wiley found certain issues that 20th Century sought to litigate to have been resolved by the judgment in Phase I. Specifically, he found 20th Century could not raise the issue of mitigation of damages and whether the issue of forfeiture properly was included in the case. As to the issues of unclean hands and the so-called fifth element of estoppel, whether equitable relief was necessary to avoid injustice, Judge Wiley noted that Judge Czuleger indicated “that these issues are not yet resolved.” He stated that “[t]his court will address these issues after the jury resolves the disputed facts.”⁵

As to the issues to be decided in the trial of Aguilera’s bad faith claim, Judge Wiley ruled that 20th Century could not try its claim that its policy did not cover Aguilera’s actions. That issue was decided against it by Judge Czuleger. However, Judge Czuleger did not resolve the question whether 20th Century “‘fail[ed] to act fairly and in good faith when discharging its responsibilities concerning an insurance contract [and that this] breach [should] result in tort liability for proximately caused damages.’ [Citation.]” Judge Wiley added that he was “not aware of any specific evidentiary limitations previously set on the scope of this trial issue.”

⁵ In *Encarnacion II*, 20th Century contended that Judge Czuleger erroneously refused to address these issues in his statement of decision. We held the contention waived. In its cross-appeal in the instant case, 20th Century again challenges the failure to address these issues.

Judge Wiley noted that Aguilera's bad faith cause of action included a claim for *Brandt* fees. The judge stated that he would address the issue after the jury reached its verdict. 20th Century later requested reconsideration of this ruling.

Judge Wiley also formulated a statement to be read to the jury. It gave the jury the background of the case and told them that "the jury must accept, that the insurance policy indeed did cover Ramon Aguilera's shooting of Marcos Gonzalez. The court has barred 20th Century from raising policy exclusions as a defense against Ramon Aguilera in this case. . . . 20th Century thus is barred now from saying that its insurance policy does not cover Ramon Aguilera's shooting of Marcos Gonzalez."⁶

⁶ The full statement read: "Members of the jury, there is a legal determination that affects your decision of this case. This legal determination concerns Ramon Aguilera's insurance policy. First, let me give you some background. [¶] On March 1, 1994, Ramon Aguilera shot Marcos Gonzalez to death. This event sparked one criminal case and two civil cases. [¶] In the criminal case, the District Attorney's Office charged Ramon Aguilera with murder. Ramon Aguilera said he was not guilty of murder because he shot Marcos Gonzalez either accidentally or in self-defense. The criminal case ended when Ramon Aguilera pleaded guilty to the crime of involuntary manslaughter. Involuntary manslaughter is a crime that involves the killing of a human being. This crime is less serious than murder.

"Besides this criminal case, there also were two civil cases. [¶] Civil case number one involved Cecilia Encarnacion, the wife of Marcos Gonzalez. She (together with the children of Marcos Gonzalez) sued Ramon Aguilera in civil court for killing Marcos Gonzalez. This case was about the appropriate damages that Ramon Aguilera might owe Cecilia Encarnacion and the children on account of the death of Marcos Gonzalez. That lawsuit brought by Cecilia Encarnacion and the children against Ramon Aguilera has been resolved. That lawsuit is not before you.

"The case before you is civil case number two. Ramon Aguilera brought civil case number two against 20th Century Insurance Company, which was his insurance company at the time he shot Marcos Gonzalez to death. Ramon Aguilera alleged that 20th Century acted in bad faith towards him, and thus is now liable to him for damages. 20th Century denies that it acted in bad faith. You jurors must decide this claim.

"There is an issue about the insurance policy between 20th Century and Ramon Aguilera. This policy contained various exclusions, but the court has determined, and the jury must accept, that the insurance policy indeed did cover Ramon Aguilera's shooting of Marcos Gonzalez. The court has barred 20th Century from raising policy exclusions as a defense against Ramon Aguilera in this case. The reason is that 20th Century promised Ramon Aguilera that it would provide insurance coverage for him in civil case

20th Century then filed a number of motions in limine, including a motion for bifurcation of trial of Aguilera's claim for punitive damages. Aguilera filed his own motions in limine, including motions to exclude evidence contradicting "facts and issues determined in equitable phase or disputing findings of bad faith" and to exclude evidence of unclean hands or the fifth element of estoppel.

20th Century also submitted another proposed statement to be read to the jury. It then submitted its proposed special verdict form. Aguilera submitted his own proposed special verdict form as well as objections to 20th Century's form. Aguilera also sought an order setting an order of proof and bifurcating trial of the bad faith and remaining equitable issues.⁷ Aguilera additionally sought orders confirming Judge Czuleger's evidentiary rulings.

Judge Wiley granted in part and denied in part the parties' evidentiary motions. Aguilera moved for reconsideration of what he characterized as "two startling rulings: (1) our jury would be allowed to speculate, against the uncontradicted evidence to the contrary, that Ramon Aguilera *might conceivably* have pled guilty to involuntary manslaughter even in the absence of 20th Century's *now firmly established* promise of coverage; and (2) communications among counsel . . . for the various plaintiffs *following* the entry of the \$5.6 million dollar verdict in 1996 would be admissible in this trial."

Judge Wiley then finalized the statement to be read to the jury. It differed from the previous statement only in the final paragraph. The new final paragraph read: "There is an issue about the insurance policy between 20th Century and Ramon Aguilera. This policy contained various exclusions, but the court has determined, and the jury must

number one if he decided to plead guilty to involuntary manslaughter in the criminal case. Ramon Aguilera indeed did plead guilty to involuntary manslaughter. 20th Century thus is barred now from saying that its insurance policy does not cover Ramon Aguilera's shooting of Marcos Gonzalez."

⁷ Judge Wiley denied this request, and Aguilera sought review of the denial by petition for writ of mandate. We denied the petition. (*Aguilera v. Superior Court* (B185248, Sept. 1, 2005).)

accept, that the insurance policy indeed did cover Ramon Aguilera's shooting of Marcos Gonzalez. The court has barred 20th Century from raising policy exclusions as a defense against Ramon Aguilera in this case. The reason is that 20th Century engaged in a course of conduct that had the effect of communicating a promise to Ramon Aguilera. The promise was that 20th Century would provide insurance coverage for Ramon Aguilera in civil case number one if he decided to plead guilty to involuntary manslaughter in the criminal case. 20th Century engaged in conduct and made representations that would have caused a reasonable insured to believe that a guilty plea would not foreclose coverage. Ramon Aguilera indeed did plead guilty to involuntary manslaughter. 20th Century thus is barred now from saying that its insurance policy does not cover Ramon Aguilera's shooting of Marcos Gonzalez."

20th Century then moved to exclude any references to Judge Czuleger's statement of decision in the Encarnacion case or to our opinion in *Encarnacion II*.

After additional motions, trial began. Counsel for both parties were given the opportunity to give mini-opening statements to the jury. Aguilera immediately moved to cite 20th Century's conduct for misconduct in the mini-opening statements and requested corrective admonitions. Aguilera also moved for a mistrial based on comments made by counsel for 20th Century in opening statements. Aguilera later filed a supplement to the mistrial motion, claiming additional misconduct by 20th Century's counsel in failing to produce documents.

The parties continued to file motions and briefs regarding the evidence to be admitted at trial, jury instructions and the special verdict form. They also continued to wrangle over the issue of *Brandt* fees. 20th Century moved for a nonsuit on that issue.

The jury reached its verdict and filled out the four-question special verdict form.⁸ Question No. 1 was: "Did defendant 20th Century Insurance Company breach the

⁸ The form was a slightly modified version of the form proposed by 20th Century. Question No. 2 on 20th Century's proposed form asked if 20th Century's breach caused "Mr. Aguilera to suffer emotional distress," rather than "injury, damage, loss or harm."

implied covenant of good faith and fair dealing in relation to the handling of the claim brought by the Encarnacions against Mr. Aguilera? The jury answered, “Yes.” Question No. 2 was: “Did the breach of the implied covenant of good faith and fair dealing cause Mr. Aguilera injury, damage, loss or harm?” The jury answered, “No.” Based on this answer, they did not answer the remaining two questions. Thereafter, Judge Wiley dismissed the jury.

20th Century then filed an ex parte motion to set trial on its remaining equitable defenses: unclean hands and lack of the fifth element of estoppel. In response, Aguilera filed an ex parte motion to empanel a jury to hear his claims for punitive damages and *Brandt* fees. He also challenged 20th Century’s motion as an unauthorized motion for reconsideration of the judgment of coverage.

Judge Wiley denied Aguilera’s motion to empanel a jury to try the issues of punitive damages and *Brandt* fees. The judge found 20th Century’s motion to try the equitable defenses to be moot and declined to rule on it.

On March 2, 2006, judgment was entered in favor of 20th Century. Aguilera and 20th Century then filed their notices of appeal from the judgment. At that time, the appeals from the judgment in the Encarnacion case were pending. We issued *Encarnacion II* on September 27, 2007.

ISSUES

Aguilera’s “Statement of the Case” is not so much a discussion of the proceedings as a rambling litany of complaints about various trial court rulings. 20th Century responds to these complaints. We decline to do so.

Rule 8.204(a)(1)(B) of the California Rules of Court requires a party to “[s]tate each point [in its brief] under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority” Consistent with this rule, “[w]e discuss those arguments that are sufficiently developed to be cognizable. To the extent [a party] perfunctorily asserts other claims, without

development and, indeed, without a clear indication that they are intended to be discrete contentions, they are not properly made, and are rejected on that basis.” (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19.)

We therefore address only those issues raised by Aguilera in proper form, i.e., supported by citations to legal authority and argument. These are:

1. Whether the trial court erred by allowing 20th Century to relitigate matters adjudicated by Judge Czuleger as reflected in his statement of decision;
2. Whether the trial court erroneously allowed 20th Century to attack the prior findings of reliance and causation;
3. Whether the trial court erroneously allowed 20th Century to attack the prior findings establishing bad faith and intent to mislead;
4. Whether the trial court prejudicially permitted 20th Century to mount a personal attack on Aguilera using evidence irrelevant to the issues of bad faith and damages;
5. Whether the trial court erred in denying Aguilera’s motion for a mistrial for 20th Century’s allegedly repeated and egregious violations of evidentiary rulings and factual findings; and
6. Whether the trial court erred in dismissing the jury without a verdict on the issues of punitive damages or *Brandt* fees.

DISCUSSION

1. Whether the Trial Court Erred by Allowing 20th Century to Relitigate Matters Adjudicated by Judge Czuleger as Reflected in his Statement of Decision

a. The Statement of Decision

We begin our analysis with Judge Czuleger’s statement of decision. The judge began by noting that “[u]nder ordinary circumstances, Aguilera’s commission of a crime like this would have cut off any claims against the policy. These are not ordinary circumstances. For the reasons set forth below, 20th Century Insurance Company is

equitably barred from raising its ordinary policy-based defenses. Based upon the evidence presented during approximately fourteen days of trial, . . . plaintiffs have carried their burden and have established legal estoppel.”

Judge Czuleger provided “a short and non-exhaustive review of the relevant facts” on which he based his decision. He stated that prior to Aguilera’s no contest plea, “20th Century knew that any relevant criminal convictions would end Aguilera’s right to coverage. 20th Century waited to inform others until just after the plea. 20th Century waited too long. 20th Century’s course of conduct here communicated an intent which mislead [*sic*] its insured. 20th Century’s action suspend its otherwise valid insurance policy exclusions.”

The judge then turned to the three equitable theories proffered by Encarnacion and Aguilera to support recovery: forfeiture, equitable estoppel and promissory estoppel. First, the judge found, “[w]ith reference to forfeiture, 20th Century’s conduct in concealing its true intent to deny coverage evidences its subjective intent” to mislead Aguilera, the policyholder, as to the scope of the criminal acts exclusion in the policy. This was sufficient to establish 20th Century’s forfeiture of its right to rely on that exclusion.

As to equitable estoppel, Judge Czuleger found that 20th Century knew it was going to deny coverage if there was a guilty plea, but it led Aguilera to believe there would be coverage. By its actions, it induced him to enter a felony plea. For this reason, it was equitably estopped to claim the plea fell within the criminal acts exclusion.

As to promissory estoppel, Judge Czulger found that “20th Century engaged in a course of conduct that taken together communicated to Aguilera and the lawyers involved in the plea, the promise that coverage would still be available even if [Aguilera] pled guilty.” It “at every opportunity engaged in conduct and made representations which would have caused any reasonable insured and his representatives to believe that a guilty plea would not foreclose coverage . . . , yet 20th Century knew there would be no coverage.” Thus, promissory estoppel applied to provide coverage.

Judge Czuleger concluded: “[T]he court finds that plaintiffs have met their burden and established equitable bars against 20th Century’s policy exclusions. The court finds that 20th Century has forfeited its rights under the policy, that it is equitably estopped from challenging plaintiffs’ claims against the policy and that 20th Century’s representations raise promissory estoppel to the exclusion of all policy defenses.”

It is undisputed that Judge Czuleger made findings on the issues of forfeiture, equitable estoppel and promissory estoppel. Judge Wiley’s statement to the jury in essence told them that these findings had been made and they were bound by them. It is Aguilera’s position that the factual findings made by Judge Czuleger to support his findings on the issues also bound the jury in the instant case. That is, Judge Wiley should have told the jury that it was established that 20th Century intended to deny coverage, but it misled Aguilera into believing it would not deny coverage and by doing so induced him to plead no contest to manslaughter.

Before finalizing the statement of decision, Judge Czuleger held a hearing on the statement of decision and the issues remaining to be determined by the jury. The judge asked what 20th Century’s defense would be in the jury trial, and its response was, “No bad faith, no unreasonable conduct.” Counsel for Encarnacion interjected, “Well, I think that they are collaterally estopped on that issue.” He suggested they have “a hearing on what are the issues and whether they are collaterally estopped on the issue of bad faith,” based on the findings in the equitable phase of the trial.

In further discussion, counsel for 20th Century asserted that “there has to be a finding of bad faith in order for us to owe anything. There must be a finding of bad faith, and our position is that is something for the jury to decide.” Counsel for Encarnacion responded, “And our position is that has already been done.” Judge Czuleger stated, “The case I tried dealt with whether the insurance company is equitably estopped from raising the exclusions that were the subject of the trial. That is what I resolved.” He added, “I did not make a finding that said they are in bad faith.”

There was further discussion as to the issues to be resolved by the jury and the possibility of crafting a statement to be read to the jury as to the findings already made.

As discussed above in the factual and procedural background, Judge Czuleger never reached a decision on the matter, as the case was transferred to Judge Wiley.

b. Bifurcation of Trial of Equitable and Legal Issues

The basic principles governing a bifurcated trial of equitable and legal issues are clear. A party has a right to a jury trial on legal, as opposed to equitable, issues. (*Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 671; *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 50.) Where both are involved in a case, the court may bifurcate trial of the case to try the equitable issues first. (*Raedeke, supra*, at p. 671; *Golden West Baseball Co., supra*, at p. 50.)

As a general rule, “[i]ssues adjudicated in earlier phases of a bifurcated trial are binding in later phases of that trial and need not be relitigated. [Citations.] No other rule is possible, or bifurcation of trial issues would create duplication, thus subverting the procedure’s goal of efficiency. [Citation.]” (*Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal.App.4th 464, 487.) Thus, once the equitable issues have been decided, the jury may be instructed as to the results of that decision. (See *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 736.)

c. The Decision in the Equitable Phase

The question here is, what is the decision in the equitable phase of the bifurcated trial or, stated otherwise, what issues were adjudicated? Aguilera’s position is that everything set forth in the statement of decision comprises the decision; all issues addressed in the statement of decision were adjudicated thereby. The cases he cites do not support this position, in that they do not deal with statements of decision. They deal, for example, with res judicata and collateral estoppel following a prior judgment on the merits (*Estate of Gump* (1991) 1 Cal.App.4th 582, 608) or a prior administrative hearing (*Imen v. Glassford* (1988) 201 Cal.App.3d 898, 906), or a partial retrial following special verdicts on some causes of action (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1480-1481).

A statement of decision, which is what we have here, is not a judgment. (*MHC Financing Limited Partnership Two v. City of Santee* (2005) 125 Cal.App.4th 1372, 1392.) Rather, it “is merely an informal statement of [the trial court’s] views. It may be helpful in framing the judgment, or, on appeal, in interpreting ambiguous or uncertain portions of the judgment. But it is not itself the decision of the court or a judgment.” (7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 10, p. 554; accord, *Bailey v. County of El Dorado* (1984) 162 Cal.App.3d 94, 97-98.)

Under rare circumstances, a statement of decision may be treated as a judgment. This includes where it is included in the judgment, or where it is signed and filed and constitutes the trial court’s determination on the merits, intended as an appealable judgment or order. (*MHC Financing Limited Partnership Two v. City of Santee, supra*, 125 Cal.App.4th at p. 1392.)

The statement of decision here was not included in a judgment or intended to serve as an appealable order or judgment. In the absence of any authority to the contrary, we must conclude that Judge Czuleger’s statement of decision was merely an explanation of his reasoning in reaching his decision. It was not the decision itself. It did not have the binding force of a judgment or order.

And we note that despite the lengthy factual discussion in the statement of decision, the actual findings or conclusions contained within it are limited. After discussing the facts and legal theories, the court concluded: “[T]he court finds that plaintiffs have met their burden and established equitable bars against 20th Century’s policy exclusions. The court finds that 20th Century has forfeited its rights under the policy, that it is equitably estopped from challenging plaintiffs’ claims against the policy and that 20th Century’s representations raise promissory estoppel to the exclusion of all policy defenses.” This was what Judge Czuleger later stated that he had found: “The case I tried dealt with whether the insurance company is equitably estopped from raising the exclusions that were the subject of the trial. That is what I resolved.” At that same time, he clearly stated: “I did not make a finding that said they are in bad faith.” Judge

Wiley properly limited his statement to the jury to a statement that 20th Century was barred from raising policy exclusions as a defense.

We conclude that Judge Wiley properly included only Judge Czuleger's ultimate findings in his statement to the jury. He was not required to include the entire contents of Judge Czuleger's statement of decision in the jury statement as factual issues adjudicated in the equitable phase of the trial.

Aguilera also suggests that an attack on the statement of decision is an attack on the merits of the judgment in *Encarnacion II* and barred by principles of res judicata and collateral estoppel. As discussed above, there has been no attack on the statement of decision or the judgment in *Encarnacion II*. All that Judge Wiley did, and we uphold, was determine what findings were made by the statement of decision which would bind the jury in the second phase of Aguilera's trial.

2. Whether the Trial Court Erroneously Allowed 20th Century to Attack the Prior Findings of Reliance and Causation

As discussed above, Judge Czuleger's explanation of his ruling in the statement of decision does not rise to the level of factual findings binding on the jury in the legal phase of the trial. Judge Wiley therefore properly allowed 20th Century to introduce evidence on, and make arguments regarding, the questions of reliance and causation to the extent they were relevant to the issue of bad faith.

And we note that, in general, the question whether an insurer has acted in bad faith is one of fact for the jury. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 888; *Dalrymple v. United Services Auto. Assn.* (1995) 40 Cal.App.4th 497, 511.) The jury is entitled to consider all evidence relevant to that question. That the evidence may have been admitted for a different purpose during the equitable phase of the trial does not preclude its admission and consideration during the legal phase. (See *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 886-887.)

Within the context of this contention, Aguilera attacks specific arguments made by 20th Century and appears to attack the sufficiency of the evidence to support the

judgment. To the extent these attacks are based on the assumption that reliance and causation were established by the statement of decision, they are without merit and we need not address them individually. As stated above, it was for the jury to decide the questions of reliance and causation for purposes of determining the issue of bad faith.

To the extent Aguilera is claiming the evidence is insufficient to support the judgment, his claim is waived by his failure to set forth all of the evidence on the matter and to demonstrate why it is insufficient to support the judgment. (*Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 843.)

3. Whether the Trial Court Erroneously Allowed 20th Century to Attack the Prior Findings Establishing Bad Faith and Intent to Mislead

Aguilera argues that “[f]actual findings of bad faith conduct were essential to the adjudication of forfeiture by Judge Czuleger.” He relies on cases which state that an adjudication of forfeiture may be based on bad faith conduct. (See, e.g., *Chase v. Blue Cross of California* (1996) 42 Cal.App.4th 1142, 1149 [“[F]orfeiture of the right to arbitration occurs when the insurer breaches the duty of good faith and fair dealing by engaging in bad faith conduct designed to mislead the insured.”].) This does not resolve the matter.

In finding forfeiture, Judge Czuleger found that 20th Century engaged in conduct designed or intended to mislead Aguilera with the intent to mislead him, citing *Chase v. Blue Cross of California, supra*, 42 Cal.App.4th at page 1157. While such conduct may constitute bad faith, Judge Czuleger did not specifically make a finding of bad faith for purposes of the bad faith cause of action, as he later pointed out when counsel for Encarnacion took the position the finding of bad faith already had been made.

As stated above, 20th Century was entitled to a jury trial on the bad faith cause of action. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc., supra*, 78 Cal.App.4th at p. 888; *Dalrymple v. United Services Auto. Assn., supra*, 40 Cal.App.4th at p. 511.) That there may have been some overlap in the factual findings necessary to resolve the equitable and legal issues does not deprive 20th Century of its right to have a

jury make those findings in connection with its trial of the legal issues. “When legal and equitable claims are joined in the same action, ‘the right to jury trial on the legal claim, including all issues common to both claims, remains intact.’” (*Lytle v. Household Manufacturing, Inc.* (1990) 494 U.S. 545, 550 [District Court’s resolution of issues raised in equitable claims under Title VII (42 U.S.C. § 2000e et seq.) claim did not bar relitigation of the same issues before a jury in connection with legal claims raised under section 1981 (42 U.S.C. § 1981)].)

The trial court therefore did not err in allowing 20th Century to try the issue of bad faith. It was not resolved during the equitable phase of the trial, and 20th Century was entitled to a jury trial on that issue.⁹

In any event, we note that the jury did, in fact, find 20th Century guilty of bad faith. It found 20th Century “breach[ed] the implied covenant of good faith and fair dealing in relation to the handling of the claim brought by the Encarnacions against Mr. Aguilera.” The jury simply found that Aguilera did not sustain any damages in connection with this breach.

4. Whether the Trial Court Prejudicially Permitted 20th Century to Mount a Personal Attack on Aguilera Using Evidence Irrelevant to the Issues of Bad Faith and Damages

Aguilera argues that “[o]ver repeated objections, 20th Century was allowed to base its defense on the claim that Aguilera was a vicious ‘murderer’ who deserves the deceit practiced on him by his insurer.” Aguilera claims that evidence regarding the shooting was irrelevant to the issue of 20th Century’s bad faith. He claims it also was

⁹ To the extent Aguilera claims error in admission of evidence of 20th Century’s state of mind on the issue of bad faith, we treat the claim as waived by Aguilera’s failure to set it forth in his opening brief as a discrete contention, supported by citation to the record and relevant authority. (Cal. Rules of Court, rule 8.204(a)(1)(B); *People v. Turner, supra*, 8 Cal.4th at p. 214, fn. 19; *American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453.)

irrelevant to the issue of damages, in that it “had no real probative value in determining the emotional distress resulting from the \$5.6 million judgment two years later.”

Prior to trial, Aguilera moved to exclude evidence regarding the shooting of Gonzalez “for the purposes of proving (1) that Aguilera was guilty of an intentional act; and (2) that Aguilera is a bad person.” Judge Wiley denied this motion. He explained that “[t]he shooting evidence is relevant to [the bad faith] issue potentially because a jury conceivably could find that—could take one of several different grounds that plaintiff in effect suffered no damages from the defense conduct because he would have pleaded guilty irrespective of the promise of coverage.” He added that he would consider a limiting instruction and indicated that if 20th Century attempted to use the evidence to show that Aguilera was a bad person, he would sustain an objection by Aguilera.¹⁰

Aguilera testified about the shooting and his plea on direct examination. He testified that the shooting was accidental. He further testified that when he pled guilty to involuntary manslaughter, he “understood that it was like an accident.” He pled guilty “[b]ecause [he] wanted them to give the money to [Encarnacion].” If he had been told that there was no promise from 20th Century to pay the \$100,000 policy limits to Encarnacion, he would not have pled guilty.

Aguilera also testified on direct examination that before pleading guilty, he was told that he could be deported if he was not a citizen. He “was really upset about all of that. [He] could also lose [his] house and everything.” After he pled guilty and 20th Century did not pay Encarnacion, he was very concerned. He did not have the money to pay her. He testified: “I have always been afraid all this time that they are going to kick

¹⁰ At the hearing, one of Aguilera’s attorney’s attempted to argue that “the plea didn’t cause damage,” but “[i]t was the denial of coverage that caused damage.” Judge Wiley requested that he hear from only one of Aguilera’s attorneys, and the other attorney acknowledged that he “did not narrowly focus on some of these specific issues because I treated them with that broad brush.” He said he would raise them later “by way of writing.”

me out of my house and they are going to kick me out and they are going to send me to Mexico.”

Aguilera’s counsel argued to the jury that Aguilera shot Gonzalez in self-defense. Later, in arguing the issue of damages for emotional distress, counsel argued not only that Aguilera had the “judgment hanging over his head,” but “he is at risk of at any time somebody at the INS could wake up and say he has a felony conviction, he is out of here.” Counsel argued that Aguilera pled guilty and went to jail “in order to assure coverage here which he didn’t have to do.” He might have been acquitted, but he pled guilty based on 20th Century’s promise of coverage. 20th Century “took a chance from [Aguilera] to be completely exonerated, remove this risk of a deportation.”

Aguilera suggests that he limited his claim for emotional distress damages to the emotional distress arising from the entry of the \$5.6 million judgment against him. It is his burden to support this claim with a citation to the record (Cal. Rules of Court, rule 8.204(a)(1); *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115), but he points to nothing in the record showing such a limitation. As his counsel acknowledged at the hearing on his motion in limine to exclude evidence regarding the shooting, he painted the issues “with that broad brush.”¹¹

It is clear that Aguilera tried the case on the theory that he was damaged by entry of the guilty plea. Indeed, Judge Czuleger’s statement of decision, which Aguilera claims should have been binding in Phase II of the trial, stated that “Aguilera relied on 20th Century’s apparent position in entering his plea to a felony and giving up whatever defenses to the criminal charges he might have had.” In the absence of any demonstration that Aguilera attempted to limit his damages to those caused by the entry of the judgment against him, we can find no error in the trial court’s admission of

¹¹ In his complaint, Aguilera simply alleged “emotional distress and other damages arising out of the bad faith conduct of defendants.” This included “severe anxiety, worry, humiliation and physical, mental and emotional distress and discomfort” and other damages to be proved at trial.

evidence regarding the shooting and Aguilera's guilty plea as relevant to the issue of damages.

Evidence is admissible if it is relevant to "any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Because the shooting evidence was relevant to the issue of damages, it was admissible whether or not it was relevant to the issue of 20th Century's bad faith.

5. Whether the Trial Court Erred in Denying Aguilera's Motion for a Mistrial After 20th Century's Repeated and Egregious Violations of Evidentiary Rulings and Factual Findings

Aguilera contends that "[t]he trial went so far off-track at the outset, with such blatant appeal to Aguilera's alleged criminality and such disregard for the prior findings as to make mistrial the only course of action."¹² As discussed above, the trial did not go off-track. The jury was not bound by Judge Czuleger's "findings," i.e., his statement of the reasons for his ruling. Judge Wiley properly admitted evidence regarding the shooting on the question of damages. There was no error requiring a mistrial to be granted. (*People v. Bolden* (2002) 29 Cal.4th 515, 555 ["A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged"].)

6. Whether the Trial Court Erred in Dismissing the Jury Without a Verdict on the Issues of Punitive Damages or Brandt Fees.

The jury found by special verdict that 20th Century breached its implied covenant of good faith and fair dealing in relation to the handling of the claim brought by the

¹² Aguilera's motion for mistrial initially was based on 20th Century's "attack upon the findings in Judge Czuleger's Statement of Decision" and Judge Wiley's failure to instruct the jury as to those findings. He later supplemented it with a claim a mistrial was required due to 20th Century having misled the jury on evidence as to state of mind and advice of counsel. Judge Wiley denied the motion without explanation.

Encarnacions against Mr. Aguilera, but it found that the breach did not “cause Mr. Aguilera injury, damage, loss or harm.” Judge Wiley then dismissed the jury. Thereafter, Aguilera filed an ex parte motion to empanel a jury to hear his claims for punitive damages and *Brandt* fees. Judge Wiley denied this motion.

Aguilera first contends that “[s]ince [*Brandt*] fees are a distinct element of economic damages [citation], a verdict finding no *general* damages could not dispose of all [*Brandt*] damages.” 20th Century counters that the jury’s finding that Aguilera suffered no damages precludes an award of *Brandt* fees, and *Brandt* fees are unavailable in a bad faith action, as opposed to an action to recover actual policy benefits.

Both parties rely on *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780 in support of their claims. In *Cassim*, the court began its analysis of the *Brandt* fees issue with the general rule that each party must pay its own attorney’s fees. (*Id.* at p. 806.) But in *Brandt*, the court “established a notable exception to this rule for insurance bad faith cases. [It] explained that if an insurer fails to act fairly and in good faith when discharging its responsibilities concerning an insurance contract, such breach may result in tort liability for proximately caused damages. Those damages can include the insured’s cost to hire an attorney to vindicate the insured’s legal rights under the insurance policy.” (*Ibid.*)

The court pointed out that because “entitlement to attorney fees as compensatory damages is premised on an insured’s need to hire an attorney to vindicate his or her contractual rights under an insurance policy, [the court] placed a critical limitation on the amount of fees recoverable. ‘The fees recoverable, however, may not exceed the amount attributable to the attorney’s efforts to obtain the rejected payment due on the insurance contract. Fees attributable to obtaining any portion of the plaintiff’s award which exceeds the amount due under the policy are not recoverable.’” (*Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th at p. 807, italics omitted.) This means that while a plaintiff can recover *Brandt* fees for work done to obtain his or her benefits under the policy, plaintiff cannot recover for work done on a tort cause of action for bad faith. (See *id.* at pp. 807-813.)

As we noted in *Encarnacion II*, “Following the judgment against him in the wrongful death action, Aguilera assigned to Encarnacion, ‘[t]o the extent that it is lawful, . . . all of his rights, title and interests in any claims against 20th Century presently possessed or to be possessed in the future by Aguilera arising out of 20th Century’s refusal to settle the underlying action within policy limits, including but not limited to the verdict, plus taxable court costs and post-judgment interest. It is the intent that Aguilera assigns and conveys only that which is lawfully assignable.’” (*Encarnacion II, supra*, at p. 46.) We concluded that “[s]ince *Brandt* fees are lawfully assignable, Aguilera assigned them.” (*Id.* at p. 47.)

Because Aguilera was not entitled to recover *Brandt* fees for his bad faith cause of action, and because he assigned to Encarnacion his right to recover *Brandt* fees for the suit to recover policy benefits, he had no basis upon which to recover *Brandt* fees, and the trial court did not err in refusing to try the matter before a jury.

As to his contention that the issue of punitive damages should be tried by a jury, Aguilera argues that the existence of an excess judgment against him supports an award of punitive damages. Again, his rights against 20th Century based on the existence of an excess judgment were assigned to Encarnacion. To the extent he claims punitive damages on his bad faith cause of action, an award of actual damages is “an absolute predicate” for a punitive damages award. (*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147; *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 238.) Since Aguilera did not recover actual damages from 20th Century, he cannot recover punitive damages. (*Sole Energy Co., supra*, at p. 239.)¹³

¹³ Inasmuch as we reject Aguilera’s contentions and affirm the judgment, we need not reach the issues raised in 20th Century’s protective cross-appeal.

DISPOSITION

The judgment is affirmed. Each party to bear their own costs on appeal.

NOT TO BE PUBLISHED

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

DUNNING, J.^{*}

^{*} Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.